IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-422

LAKE CARRIERS' ASSOCIATION, et al.,

Appellants,

vs.

RALPH A. MacMULLAN, et al.,

Appellees.

Appeal From The United States District Court
For The Eastern District Of Michigan,
Southern Division

# BRIEF FOR APPELLEES.


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## COUNTERSTATEMENT OF FACTS

In essence appellee accepts the Statement of the Case submitted by appellants. However, certain omissions therefrom compel the following additions to the Statement submitted by appellants.

Presently there are sanitary devices on the market which comply with the requirements of the Michigan statute, Act 167, Public Acts of Michigan 1970, and are installed upon and being used by a number of commercial vessels plying the Great Lakes. (A. 49, 50, 110). The Michigan statute imposes no requirement not within the capability of present technology.

There has been no enforcement of the Michigan statute against commercial vessels on the Great Lakes. Rather, Michigan has embarked upon a program of obtaining

voluntary compliance by the lake carriers. (A. 94, 140). Granted, there are presently only several pump-out facilities on shore for commercial vessels. However, Michigan authorities have been working on the problem with the carriers and municipalities (A. 94, 115), as well as with companies owning docks and wharves. (A. 107, 108, 136, 137, 138). Certainly no harrassment has or will occur. (A. 140).

Various suggestions were made as to the location of the required holding tanks, including use of the ballast tanks. Appellants assert that ballast tanks could not be used in order to comply with Michigan law because of corrosion. However, this could be simply solved by coatings or liners being placed in the ballast tanks. (A. 101, 102). The experience of the Ford Motor Company and others indicates that location of the tanks is a problem easy of solution.

While many municipal sewage systems discharge effluent equivalent in quality to that now being discharged by the commercial vessels, the problem arises in that the municipal systems are a known point of discharge and the water quality for that particular area can be set and governed accordingly, whereas commercial vessel discharges are obviously from a highly mobile point and no control of same is possible in the absence of the complete retention provided for in the Michigan statute. (A. 94, 120, 140). Thus, such discharges by commercial vessels may occur at any point on the Great Lakes including points where municipal water intakes are located, bathing beaches, and other points of domestic use and recreational sites (A. 95), and thus become a hazard to health. (A. 64, 65, 98, 120, 123, 124).

In view of the fact that the State of Michigan has the longest shoreline of any state except Alaska, and all of

said shoreline borders on the Great Lakes, this matter is of paramount interest to this State. The bulk of Michigan's population lives along the shoreline and draws its water supply from the Great Lakes. Therefore unregulated pollution of these waters as is being committed by appellants and other lake carriers poses a serious menace to the health of Michigan inhabitants. (A. 122). The charts attached to appellants' jurisdictional statement graphically demonstrate the widespread nature of pollution from vessels and the frequency of their in-shore operations is stark testimony of the fact that overboard discharge of human waste imperils the health of our populace.

Despite amendments to the Federal Water Pollution Control Act, 33 USC No. 1151, et seq., no change has been made in Sec. 1151(b) thereof wherein it is declared to be the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States in preventing and controlling water pollution. Further, Sec. 1151(c) of the Act states that nothing therein shall be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.

For the convenience of the Court we are reproducing as Appendix A hereto, the Opinion of the District Court.

## ARGUMENT

### I.

### THE TRIAL COURT PROPERLY ABSTAINED FROM DECIDING THIS CAUSE ON ITS MERITS AND DEFERRED TO THE STATE COURTS.

### A.

### A Federal District Court May Properly Invoke The "Abstention Doctrine" Where A Case May Be Disposed Of By Interpretation In The Michigan Court System.

In *Railroad Commission v. Pullman Co.*, 312 US 496 (1941), this Court first embarked upon the modern doctrine of abstention. Speaking for a unanimous Court, Mr. Justice Frankfurter stated:

> "In this situation a federal court of equity is asked to decide an issue by making a tentative answer which may be displaced tomorrow by a state adjudication. * * * The resources of equity are equal to an adjustment that will avoid the waste of a tentative decision as well as the friction of a premature constitutional adjudication."

There is considerable recognition of circumstances under which a federal court may decline to proceed (or to abstain) even though it has jurisdiction under the Constitution and the statutes.

This Court, for instance, has consistently applied the concept that "proper exercise of federal jurisdiction requires that controversies involving unsettled questions of state law be decided in the state tribunals preliminary

to a federal court's consideration of the underlying federal constitutional issues." *City of Meridian* v. *Southern Bell Telephone and Telegraph Co.*, 358 US 639, 640, 641 (1959); *Fornaris* v. *Ridge Tool Co.*, 400 US 41 (1970).

Two recent cases of particular interest in spelling out guidelines for the abstention doctrine are *Reetz* v. *Bozanich*, 397 US 82, 85 (1970), and *Askew* v. *Hargrave*, 401 US 476 (1971). In *Reetz*, this Court held that a federal district court erred in not abstaining while the parties to the suit sought a state court decision on the effect of an Alaskan statute which established guidelines on who would be eligible for salmon net gear licenses for commercial fishing. This Court felt that a state court decision could conceivably avoid any decision under the Fourteenth Amendment and would avoid any possible irritant in the federal-state relationship.

*Askew* v. *Hargrave*, 401 US 476 (1971), strongly endorsed the abstention doctrine as set out in *Reetz*. This Court held in *Askew* that a federal District Court should abstain from considering a federal action challenging a state statute in deference to a pending state court action which was filed subsequent to the federal suit.

The statute here under attack, the Michigan Watercraft Pollution Control Act, MCLA 323.331; MSA 3.533(201), has *not* as yet been interpreted by a Michigan Court. Indeed, a decision by a Michigan Court might well obviate the need for a decision by a federal court because of the following three reasons:

(1) Appellants assert that the Michigan Watercraft Pollution Control Act denied them the equal protection of the laws. Art. 1, Sec. 2 of the 1963 Michigan Constitution, however, provides that "no persons shall

be denied the equal protection of the laws . . . .'' Conceivably, a Michigan Court could resolve the instant matter on state law alone which would, therefore, avoid the federal questions which appellants seek to pose.

(2) Appellants also allege that the Michigan Watercraft Pollution Control Act denies them due process. Yet, Art. 1, Sec. 17 of the 1963 Michigan Constitution provides that ''no person shall be . . . deprived of life, liberty or property, without due process of law.'' A Michigan Court could here also conceivably resolve the entire matter on a state law question.

(3) Appellants also assert that the Michigan Watercraft Pollution Control Act is inconsistent with federal law. Sec. 11 of the Michigan Watercraft Pollution Control Act, however, provides that:

> ''To be enforceable, the provision or the rule shall be of such flexibility that a watercraft owner, in carrying out the provision or rule, is able to maintain maritime safety requirements and *comply with the federal marine and navigation laws and regulations.*'' (Emphasis added.)

A Michigan Court is expressly mandated to interpret the Michigan Watercraft Pollution Control Act, therefore, in a manner which would obviate completely the necessity for a federal court decision.

Thus, it cannot be denied that the Michigan Watercraft Pollution Control Act involves unsettled questions of State law and that a Federal District Court may and should abstain from deciding the federal question when there are unsettled questions of State law.

## B.

### A Federal District Court Should Not Enjoin Or Disrupt State Criminal Proceedings Unless Irreparable Injury Is Shown From Harassment In The Prosecution Of Patently Unconstitutional Statutes.

The sensitive nature of our system which involves both State and National interests has produced a long standing policy against federal court interference with state court proceedings. See, *Fenner et al* v. *Boykin et al,* 271 US 240 (1926); *Younger* v. *Harris,* 401 US 37 (1971).

This Court has reviewed this long standing policy recently in a series of cases. In *Younger* v. *Harris,* 401 US 37 (1971), for example, an action was brought in federal court to enjoin prosecution under a State Syndicalism Act alleging that the prosecution and the statute had a "chilling effect" upon the exercise of the right of free speech. This Court held, however, in *Younger* that "federalism" requires that federal courts not enjoin state criminal proceedings except in the exceptional case of bad faith and harrassment in the prosecution of patently unconstitutional statutes where the danger of irreparable loss to the defendants is both great and immediate.

Similarly, in *Samuels* v. *Mackel,* 401 US 66 (1971), an action was brought in federal court seeking a declaratory judgment holding a state criminal anarchy statute unconstitutional. This Court held that the standards as expressed in *Younger* apply even though declaratory relief rather than injunctive relief was involved.

Furthermore, in *Boyle* v. *Landry,* 401 US 77 (1971), this Court applied the *Younger* standards to a case that was brought under the guise of threatened criminal prosecution.

The *Younger*, *Samuels* and *Boyle* cases are undoubtedly intended to limit the effect of *Dombrowski* v. *Pfister*, 380 US 479 (1965), a case which appellants rely upon heavily. In *Dombrowski*, this Court enjoined a threatened criminal prosecution under an unconstitutionally vague statute. As mentioned earlier, however, the circumstances in *Dombrowski* were extreme. The State law involved in *Dombrowski* was unconstitutional as applied and was being utilized in an attempt to discourage persons from their endeavors in the civil rights field. It was also questionable whether officials had any real hope at all of obtaining convictions. In short, *Dombrowski* represented a factual situation of pure harassment and a statute which on its face was constitutionally suspect.

If less exacting standards for injunctions are to be applied, as was the case in *Dombrowski* and as the appellants suggest, the result would be an unfortunate flooding of federal courts with pleas for intervention in threatened or pending state proceedings. It would also result in serious friction between state and federal forums as the inevitable race between prosecutors and defendants to different jurisdictions unfolded.

Therefore, the appropriate restrictive policy and rule to follow in the instant case has been repeatedly stated by this Court. Mr. Justice Whittaker succinctly stated the guidelines regarding the role of federal courts vis-a-vis state courts in *Wilson* v. *Schnettler*, 365 US 381, 385 (1961), as follows:

> "There is still another cardinal reason why it was proper for the District Court to dismiss the complaint. We live in the jurisdiction of two sovereignties. Each has its own system of courts to interpret and enforce its laws, although in common territory. These courts could not perform their respective functions

without embarrassing conflicts unless rules were adopted to avoid them. Such rules have been adopted. One of them is that an accused 'should not be permitted to use the machinery of one sovereignty to obstruct his trial in the courts of the other, unless the necessary operation of such machinery prevents his having a fair trial.' *Ponzi* v. *Fessenden*, 258 U.S. 254, 260. Another is that *federal courts should not exercise their discretionary power 'to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent ....' Douglas* v. *City of Jeannette, supra,* at 163." (Emphasis added).

While holding abstention improper in *Dombrowski* v. *Pfister*, 380 US 479 (1965), the Court did give guidance when it stated (pages 484, 485):

"... considerations of federalism have tempered the exercise of equitable power, for the Court has recognized that *federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework.* It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings." (Emphasis added).

Finally, this Court has just recently succinctly stated:

"As our holdings today in *Younger* v. *Harris,* ante, and *Samuels* v. *Mackell,* ante, show, the normal course of state criminal prosecutions cannot be disrupted

> or blocked on the basis of charges which in the last analysis amount to nothing more than speculation about the future." *Boyle* v. *Landry*, 401 US 77, 81 (1971).

The guidelines for the federal courts then are quite clear.

In the instant case, appellants seek to raise the constitutional validity of a Michigan criminal statute in federal court. They seek to disrupt or block the normal course of Michigan criminal prosecutions. Yet, there is no establishment by the appellants of great and immediate irreparable harm as is required for federal court intervention under the *Younger* and *Samuels* reasoning or even under *Dombrowski*. At best, appellants seek to vitiate a state criminal law statute on "nothing more than speculation about the future." The District Court, therefore, properly abstained here rather than disrupt the Michigan system of criminal prosecutions based on speculative allegations.

**C.**

**This Court Should Not Issue Appellants An Advisory Opinion That Would Have The Effect Of Prohibiting Michigan From Taking Any Action In The Field Of Great Lakes Water Pollution.**

Stripped of all its embellishment, appellants' argument is nothing more than an attempt to secure an advisory opinion that would have the effect of prohibiting any state action in the field of Great Lakes water pollution until such time as the federal government manifests its intention and takes control. This is further substantiated by appellants' position that this Court should proceed to decide the case immediately. (See Appellants' Brief, at 16, 17.)

This Court, however, should decline to issue appellants an advisory opinion. Of particular significance on this point is the case of *Public Service Commission of Utah, et al.*, v. *Wycoff Company, Inc.*, 344 US 237 (1952). The facts in *Wycoff* are rather similar to the case at bar. In *Wycoff*, the respondent-corporation sought in federal court a declaratory judgment that transporting goods between points in a state constituted interstate commerce and did not require permission from a state public service commission.

The respondent-corporation also sought an injunction restraining the state public service commission from interfering with such transportation. This Court in an opinion authorized by Mr. Justice Jackson, however, held that the circumstances were such as to warrant the court in denying declaratory relief and that injunctive relief was also improper.

Summarizing the case before it in *Wycoff*, Mr. Justice Jackson said at 245:

> "In the first place, this dispute has not matured to a point where we can see what, if any, concrete controversy will develop. It is much like asking a declaration that the State has no power to enact legislation that may be under consideration but has not yet shaped up into an enactment."

And the Court went on to say at 247-248:

> "*Declaratory proceedings in the federal courts against state officials must be decided with regard for the implications of our federal system.* State administrative bodies have the initial right to reduce the general policies of state regulatory statutes into con-

crete orders and the primary right to take evidence and make findings of fact. *It is the state courts which have the first and the last word as to the meaning of state statutes* and whether a particular order is within the legislative terms of reference so as to make it the action of the State. We have disapproved anticipatory declarations as to state regulatory statutes, even where the case originated in and was entertained by courts of the State affected. *Alabama State Federation of Labor* v. *McAdory,* 325 U.S. 450. Anticipatory judgment by a federal court to frustrate action by a state agency is even less tolerable to our federalism. Is the declaration contemplated here to be res judicata, so that the Commission cannot hear evidence and decide any matter for itself? If so, the federal court has virtually lifted the case out of the State Commission before it could be heard. If not, the federal judgment serves no useful purpose as a final determination of rights.

"The procedures of review usually afford ample protection to a carrier whose federal rights are actually invaded, and there are remedies for threatened irreparable injuries. *State courts are bound equally with the federal courts by the Federal Constitution and laws. Ultimate recourse may be had to this Court by certiorari if a state court has allegedly denied a federal right.*

"In this case, as in many actions for declaratory judgment, the realistic position of the parties is reversed. The plaintiff is seeking to establish a defense against a cause of action which the declaratory defendant may assert in the Utah courts. Respondent here has sought to ward off possible action of the petitioners by seeking a declaratory judgment to the effect that he will have a good defense when and if

that cause of action is asserted. Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right; if that right is in reality in the nature of a defense to a threatened cause of action. *Federal courts will not seize litigations from state courts merely because one, normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law. Tennessee* v. *Union & Planters' Bank*, 152 U.S. 454; *The Fair* v. *Kohler Die & Specialty Co.*, 228 U.S. 22; *Taylor* v. *Anderson*, 234 U.S. 74." (Emphasis added).

We have burdened the Court with this lengthy quotation inasmuch as the language of *Wycoff* compels the conclusion that the District Court properly decided to abstain in the case at bar.

## II.

## THE MICHIGAN STATUTE IMPOSES NO UNDUE BURDEN ON INTERSTATE OR FOREIGN COMMERCE.

### A.

### The Michigan Statute Is A Lawful Exercise Of The State's Police Power In The Promotion Of The Public Health, Safety And Welfare.

Appellants allege that enforcement of the Michigan Watercraft Pollution Act of 1970 constitutes the taking of appellants' property without due process of law, constitutes a denial of the equal protection of the law, and is vague and ambiguous in that the Act does not specify with certainty the conduct it intends to proscribe and punish.

These arguments are to no avail however if there is any reasonable basis for the legislative enactment. This principle was enunciated by this Court in *Morey* v. *Doud* 354 US 457 (1957), when speaking through Mr. Justice Burton, the rules for testing a state's action in light of the equal protection clause were established:

> "'1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When

the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitary.' *Lindsley* v. *Natural Carbonic Gas Co.*, 220 US 61, 78-79."

The legislature is the chosen representative of the people of the State of Michigan and, when it speaks, there is a presumption of constitutionality unless its repugnance to Federal mandates clearly appears beyond all reasonable doubt. *Tower Realty* v. *City of Detroit*, 196 Fed 2d 710 (6th Cir.. 1952). In *Williams* v. *Lee Optical Company*, 348 US 483 (1955), this Court announced at page 488 that:

> "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident or out of harmony with a particular school of thought."

In the same decision this Court went on to remark:

> ". . . The prohibition of the equal protection clause goes no further than the invidious discrimination."

State legislation based upon the exercise of its police power, which does not unduly burden interstate commerce is not in conflict with the commerce clause. *Huron Portland Cement Co,* v. *Detroit,* 362 US 440 (1960). In *Huron* Mr. Justice Stewart succinctly summarized the law in this area:

> "In determining whether the state has imposed an

undue burden on interstate commerce, it must be borne in mind that the Constitution when 'conferring upon Congress the regulation of commerce . . . never intended to cut the states off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly' affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution."

Of note is the fact that in *Huron*, as in this case the vessels had to install special equipment to comply with the City's anti-pollution ordinance.

At issue in this cause we have a state statute designed to prevent appellants and others in their class from pouring their filth, no matter how well treated, into Michigan waters of the Great Lakes. It is difficult to think of a more salutary exercise of the state's police power. The statute is applicable to all watercraft plying Michigan waters and thus belies any equal protection or discrimination argument.

The mere fact that appellants may have to make a pecuniary expenditure to comply with the Michigan statute does not justify the overthrow of the legislation. *L'Hote* v. *City of New Orleans*, 177 US 588 (1900). Speaking through Mr. Justice McKenna, this Court in *Erie Railroad Company* v. *Williams* 233 US 686 (1914) stated:

> "It is hardly necessary to say that cost and inconvenience would have to be very great before they could become an element in the consideration of the right of a state to exert its reserved power or its Police Power."

Testimony in this case regarding the cost of installing total retention devices ranges all the way from $20,000 per vessel to $100,000 per vessel. (A. 72, 73, 111). In view of the fact that these vessels are now costing some $14,000,000 to construct (R. 130, 131), the cost of installing a total retention system is certainly an insignificant factor in this discussion.

## B.

## The Michigan Statue Is Not Unconstitutionally Vague So As To Prohibit Appellants From Complying Therewith.

At the outset we point out an apparent dichotomy between appellants and amici supporting them in this matter. Appellants claim impossibility of compliance because of alleged vagueness in the statute whereas amicus *Assurance-foreningen Gard, et al.,* state at page 5 of their brief:

> "The terms of the Michigan Act are so plain as to require no interpretation whatever by the Michigan courts."

The terminology in Act 167, Public Acts of 1970 contains no mysterious words which would vitiate the statute or be any hindrance to appellants in complying therewith. Very simply, the portion of the law with which we are here concerned, prescribes that no sewage shall be discharged into the waters of this state and that to accomplish this purpose holding tanks, self-contained marine toilets or incinerating devices shall be part of the vessel's equipment. In fact appellants' own witness gave a comprehensive description of holding tanks and their installation. (A. 65-71). Apellants represent that they are having difficulty in the construction of the term "noxious" in the Michigan Statute. Webster's Seventh New Collegiate Dictionary clears up

their problem by defining "noxious" as any "harmful" substance. Any substance, such as sewage, is per se harmful to the quality of water and its discharge in said water would make same "noxious." The term is easily understood. (A. 40). As stated earlier, appellants' foreign brethren do not seem to have the interpretative problem pleaded by appellants.

All of appellants' arguments alleging vagueness and uncertainty in the Michigan statute are, if true, merely arguments stressing a need for construction of the statute by Michigan courts and buttressing the District Court's decision to abstain. While there may be room for construction of the statute by the Michigan courts which would nullify appellants' federal claims, the wording of the statute leaves no doubt as to what appellants are required to do. Moreover, the very Federal act upon which the appellants rely, The Water Quality Improvement Act of 1970, contains express provision for differing standards to meet varying local conditions:

> ". . . Upon application by a State, and where the Secretary determines that any applicable water quality standards require such a prohibition, he shall by regulation completely prohibit the discharge from a vessel of any sewage (whether treated or not) into those waters of such State which are the subject of the application and to which such standards apply."

Furthermore, the record does not support the existence of any alleged conflict between State and Federal law.

Thus, for there to be any conflict on the face of these two enactments, it would be necessary to postulate a factual situation in which a boat was discharging sewage which was "adequately treated" for purposes of Federal law but was

"detrimental to the public health" for purposes of State law. The State suggests that the record of this case is wholly barren of any facts which would support such a factual situation.

This Court in *Huron Portland Cement Company* v. *City of Detroit,* 362 US 440, at 445-446 (1960), recognized that unless there was a clear "overlap" on the record, none would be presumed where the State was acting to "protect the health" of the local community.

## III.

## THE MICHIGAN WATERCRAFT POLLUTION CONTROL ACT OF 1970 IS A REASONABLE AND NECESSARY EXERCISE OF THE POLICE POWER OF THE STATE OF MICHIGAN. NOTHING IN THE FEDERAL CONSTITUTION OR IN EXISTING FEDERAL LAW PROHIBTS THE STATE FROM SO EXERCISING ITS POLICE POWER.

The appellants' argument proceeds from the premise that there is a conflict between State and Federal law in the area of control of watercraft pollution. In point of fact, however, there is, on this record, no such conflict presented.

Thus, contrary to the appellants' assertion that "national uniformity is necessary" and that "compliance with both federal and state reguations is a physical impossibility" (Br. 19), the Congress has clearly indicated in the Federal Water Pollution Control Act that this is primarily an area of State responsibility:

"...

"(b) In connection with the exercise of jurisdiction over the waterways of the Nation and in consequence

of the benefits resulting to the public health and welfare by the prevention and control of water pollution, it is declared to be the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the States in preventing and controlling water pollution, to support and aid technical research relating to the prevention and control of water pollution, and to provide Federal technical services and financial aid to State and interstate agencies and to municipalities in connection with the prevention and control of water pollution. . . .

"(c) Nothing in this chapter shall be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States."

## IV.

**THE CONGRESS, IN ENACTING THE WATER QUALITY IMPROVEMENT ACT OF 1970, EXPRESSED A CLEAR AND MANIFEST INTENTION TO PERMIT THE STATES TO ADOPT AND ENFORCE REASONABLE REGULATIONS UNTIL THE EFFECTIVE DATE OF FEDERAL REGULATIONS.**

**THE FEDERAL REGULATIONS WILL NOT BE EFFECTIVE UNTIL AT LEAST FIVE YEARS AFTER PROMULGATION.**

**THE FEDERAL REGULATIONS HAVE NOT YET BEEN PROMULGATED.**

**THEREFORE, THIS AREA IS OPEN TO STATE REGULATION FOR AT LEAST FIVE MORE YEARS.**

The Congress, in enacting the Water Quality Improve-

ment Act of 1970, clearly manifested its intention to permit reasonable State regulation with respect to marine sanitation devices until such time as the Federal government was able to effectively occupy the field.

Thus, the Federal law, in Section 13(a) (2) (33 USC 1163) defines an "existing vessel" as any watercraft "the construction of which is initiated before promulgation" of Federal standards. No Federal standard having yet been promulgated, *every* vessel involved in the matter at bar is, by Congressional definition, an "existing vessel." Section 13(c) (1) (33 USC 1163), expressly and clearly provides that Federal standards shall not be "effective" as to "existing vessels" until "five years after promulgation." Section 13(f) (33 USC 1163), then provides that *after the effective date* of the Federal regulations, the States may no longer enforce their own statutes or regulations.

Therefore, as is most clearly indicated by the use of the word "effective" in Section 13(c) (1) as compared to the use of that same word in Section 13(f), it is manifestly obvious that the Congress did not intend to occupy the field to the exclusion of the States until such time as the Federal government was prepared to engage in a meaningful regulation of the field.

To give any other interpretation to the Federal Act is to assume that the Congress, having first determined that the pollution of the Great Lakes was a matter of grave national concern, then adopted a scheme that could have no impact for a minimum of five years, during which the States would be powerless to act, and massive pollution could occur without either the Federal or State governments having any authority to do anything to abate the situation. Such a construction is simply not supported by the Congressional language which imposes heavy responsibility in the area of water pollution on the States.

Therefore, there is no question as a matter of law but that Michigan may presently enforce its statute. Indeed, Section 1 of the Federal Water Pollution Act, as amended, expressly declares it to be the policy of the Congress to *recognize, preserve* and *protect* the primary responsibilities and rights of the States in preventing and controlling water pollution (33 USC §1151(b)).

## V.

## THERE IS NOTHING IN THE RECORD OF THIS CAUSE TO SUGGEST THAT THE STATE WILL INTERPRET, CONSTRUE, OR ENFORCE ITS STATUTE SO AS TO CONFLICT WITH THE VESSEL INSPECTION LAWS ADMINISTERED BY THE UNITED STATES COAST GUARD.

The authority of the United States Coast Guard to prescribe standards with respect to marine pollution control devices is not contained in the statutes upon which the appellants rely, but rather is contained in the Water Quality Improvement Act of 1970, specifically in Sections 13(c) (2), 13(g) (2), and 13(k) (33 USC 1163).

Since no Federal standards for the enforcement of the Federal Act have yet been promulgated, the carriers are engaged in mere hypothetical speculation when they suggest that there is any conflict between State law and Federal regulations.

It is also most relevant to note that the Michigan legislature manifested its intention that there be no such conflict by specifically enacting in Section 11 of the Michigan Watercraft Pollution Control Act of 1970 that:

"Any person who violates any provision of this act is guilty of a misdemeanor and shall be fined not more than $500.00. To be enforceable, the provision or the rule shall be of such flexibility that a watercraft owner, in carrying out the provision or rule, is able to maintain maritime safety requirements and comply with the federal marine and navigation laws and regulations."

Furthermore, as the District Court so correctly stated, if there is any attempt by the State to construe the State statute so as to constitute an undue burden upon interstate commerce, there would then be an actual controversy presented which should, in light of Section 11 of the Michigan act, then be litigated in State court. (11b, 12b of Appendix A. of this Brief).

Upon this state of the record, however, there is no showing of any conflict, real or imagined. The carriers do assert (Br. 28) that "the biogest system . . . cannot pass muster under local Michigan law." The biogest system, used by many vessels however, may or may not "pass muster" under the Federal regulations. As Mr. Joe Girz, an executive of the Biogest Corporation, manufacturer of this system, recently admitted:

"...

"Based on what preliminary information we have on the federal standards proposed by the Environmental Protection Agency, *we are confident that we can meet these new effluent* criteria. We come to this conclusion based on presently accepted standards, sanitary engineering rationale.

"Of course, as you all know, any unit must eventually

conform to Coast Guard test conditions, which conditions are yet to be formulated." (Emphasis supplied.)

—*Sewage Control for Great Lakes Vessels,* "Proceedings of a Symposium held September 29, 1971, Louisville, Kentucky," Society of Naval Architects & Marine Engineers, published by the University of Michigan College of Engineering, January 1972, page 65.

Indeed, there are severe technical problems with the biogest system. In an official report of the United States Government, it was recently noted that:

"In principle, the aerobic digestion system should adequately treat shipboard sewage and also ground, grease-free galley wastes. There are, however, many shipboard environmental factors that degrade system efficiency.

"The primary problem with regard to aerobic digestion systems aboard ship relates to the care and feeding of the aerobic bacteria. When an ample supply of both food and oxygen is available these bacteria thrive, multiply, and do their job well. But if their food supply is limited, they die; if there is an oversupply of food, with a concomitant reduction in oxygen content, they also die. They are sensitive to many materials often dumped into shipboard sanitary systems such as cleaning fluids, detergents, and other chemicals. If initially working in either a salt water or a fresh water environment they will perform as expected but, if the environment changes, the bacteria do not accommodate rapidly to it, and for some period of time they fail to function while adapting to the change. Additionally, these systems do not respond adequately

to the hydraulic shock loading frequently encountered on shipboard.

"In some systems the biological decomposition process is accelerated by heating the aeration tank. It might also be pointed out that the process slows down considerably at lower temperatures, which often occur aboard ship, and thus some heating is required both in the aeration tank and in the separation tank. The efficiency of the process can be reduced by ship motions that tend to disrupt the gravitational and buoyant separation of heavy and light solids in the separation tank, with the result that solid particles frequently accompany the presumably clear liquid into the disinfecting tank. Also, a sludge comprising only partially oxidized organic compounds, tends to deposit on the bottom of the aeration and separation tanks; this requires disposal by some other means if effluent quality is to be maintained."

—"Treatment and Disposal of Vessel Sanitary Wastes," National Academy of Sciences, MRIS Report July 1971, page 47.

The State, therefore, contends there is no concrete factual basis upon which to debate or litigate Michigan requirements on the issue at this time. If the carriers desire to put in some proofs and seek a declaration of their rights, no good reason is here shown why the issue should not be litigated in the Michigan Court system.

The absence of any substantial or meaningful conflict is further demonstrated by a comparison of the impugned state statutory scheme with the Federal Water Pollution Act. Thus, the Federal Act provides in pertinent part:

". . . the Secretary . . . shall promulgate Federal standards of performance for marine sanitation devices . . . which shall be designed to prevent the discharge of untreated or inadequately treated sewage into or upon the navigable waters of the United states. . . ." (33 USC §1163(b) (1)).

The State Act is harmonious with this scheme in that Michigan law prohibits with the exception of human waste, only those discharges which are "detrimental to the public health or to the enjoyment of the water for recreational purposes." (Section 3(1)). In Section 11 of the Michigan Act, the legislature specifically deferred to Federal standards:

". . . To be enforceable, the provision or the rule shall be of such flexibility that a watercraft owner, in carrying out the provision or rule, is able to maintain maritime safety requirements and comply with the federal marine and navigation laws and regulations."

## VI.

## PRESENT SHORTAGE OF PUMP-OUT FACILITIES NO REASON FOR VITIATING THE MICHIGAN STATUTE.

The carriers' argument proceeds from a false premise. The reason that there are as yet only limited pump-out facilities available is quite simply due to the pendency of this litigation. Most of the carriers *use their own piers* for loading and unloading. (A. 99). Rather, than setting some central point for pump-out and thereby, in effect, telling the carriers where they must go to pump-out, the State has left the development and placement of pump-out

facilities to private enterprise and cooperation with municipalities. Private entrepreneurs have, in fact, developed and located (at the Ford Motor Company piers) such an arrangement for the Ford Motor Company Ships. (A. 111, 112). Others will undoubtedly be built soon. But, obviously, the private developers are awaiting the result of this appeal prior to actually constructing or developing any more such facilities.

The carriers related claim that Michigan's shore cities are not yet providing secondary treatment (Br. 35) presents an inaccurate and immaterial point. Since this is the same contention that is also the thrust of their "Point 7," the State will offer a full response under that designation.

## VII.

## APPELLANTS ARE NOT DENIED THEIR CONSTITUTIONAL RIGHT OF EQUAL PROTECTION OF THE LAW.

The appellants' contention that they are being denied the equal protection of the law by being held to higher requirements than municipalities proceeds from an inaccurate premise.

First of all, the State points out that there is an essential factual distinction between a shore-based point of discharge of wastes and a shipboard discharge of wastes into the Great Lakes. Michigan has the longest shoreline of any State except Alaska. The shore cities of Michigan not only discharge treated wastes into the waters of the Great Lakes, but these communities also take their drinking water from the Great Lakes. Great care is taken in the location of the water intakes to insure that no waste material

is discharged in such a way as to endanger the people who drink this water. The State constantly checks the quality of the water near any water intake. (A. 119). Therefore, if a shore-based discharge facility were to begin to pose any sort of problem in terms of a water intake (or a public bathing beach), the State could take immediate steps to alleviate the problem.

Vessels, however, do not discharge at a given specific point. As is indicated by the appellants' route maps (A. to Jurisdictional Statement) these boats are not sailing out in the middle of the lakes, but they are, rather, hugging the shoreline. Hence, the discharge of sewage from a boat could be anywhere along the shoreline. Such a discharge could, in fact, be *right over a muncipal water intake.* While the State can protect its citizens from the shore-based discharge by keeping a vigilant watch on how close such discharges are to intakes, there is no conceivable way in which the State can protect its citizens from a helter-skelter discharge of potentially dangerous wastes along the shoreline by the hundreds of boats which regularly sail along the shoreline. By requiring the boats to discharge into shore based facilities, the State can control the impact, if any, on shore based water intakes and bathing beaches. Therefore, in terms of public safety, there is significant and substantial difference between the two types of discharges. (A. 120, 121). Such a factual difference is recognized as a legitimate basis for a difference in treatment. *Morey* v. *Doud,* 354 US 457 (1957).

The second major inaccuracy in the appellants' argument is their misinterpretation of the record concerning secondary waste treatment by shore municipalities. In point of fact, the State of Michigan is making, and has made, great progress in converting such treatment plants into secondary treatment plants. As is set out in the testimony of Ralph

Purdy, substantial progress has been made by these municipalities and it is now estimated that all of Michigan's shore municipalities will have operational secondary waste treatment facilities by 1973-1974. (A. 132, 133, 134).

Thus, contrary to the appellants' assertions, this is an area in which two very different problems are essentially being treated the same way. There is, therefore, no equal protection problem presented on this record. *All watercraft traversing Michigan waters are subject to the same requirement regarding the discharge of sewage.*

## VIII.

## COMPLIANCE WITH MICHIGAN STATUTE WILL CAUSE NO DAMAGE TO APPELLANTS.

Despite appellants' arguments concerning Federal supremacy in the area we are discussing, we forcefully remind the Court that presently there are no Federal standards with which the Michigan statute may be in conflict. True, under the Water Quality Improvement Act the Environmental Protection Agency (EPA) is obligated to promulgate rules governing the standards for the control of sewage from vessels. However, this has not as yet been done, although notice thereof has been given. In the Federal Register, Vol. 36, No. 92—Wednesday, May 12, 1971, the EPA gave notice of its intent to promulgate rules and published the proposed rules. In the notice is contained the following extremely significant statement:

> "Holding tanks and other devices which preclude any discharge are presently on the market and are capable of providing compliance with the standards."

The notice further advises that under the statute any State may apply to the Administrator of the EPA for issuance of a regulation prohibiting discharge from a vessel of any sewage, and states:

> "No-discharge regulations issued by the Administrator will become effective no sooner than the effective dates of the initial standards and regulations issued under section 13(b). *Until such dates, the States have the authority to adopt and enforce their own statutes or regulations on this subject without Federal participation.*" (Emphasis added).

So what is the carriers' problem? They have already been told by the EPA that holding tanks or other no-discharge devices, as provided in the Michigan statute, will meet the Federal standards when same are promulgated. They have been advised that until EPA standards are promulgated the States are free to enforce their own statutes on this subject. Logically, it would seem to be good business to proceed to comply with the Michigan statute and thus be assured of being in conformity with any future EPA regulations. Or could it be that appellants are hopeful that EPA regulations will permit them to continue their pollution of the Great Lakes by requiring something less than a complete retention device?

Even this hope by the carriers could be in vain if a no-discharge order is issued by the Administrator. The Governor of the State of Michigan has requested a no-discharge order and same has been acknowledged by the Administrator. (See Appendix B, attached to this Brief).

Appellants further claim that by complying with the Michigan statute their role in the anti-pollution campaign could be stultified when other jurisdictions enacted legisla-

tion on this subject with which appellants would not be in compliance. In response the State of Michigan says that most of the so-called Great Lakes States have taken some form of action regarding discharge of sewage from vessels. The Port of Chicago has a no-discharge ordinance (A. 138), and the states of Wisconsin, Illinois, Indiana and New York have similar programs. The St. Lawrence Seaway Authority does not permit discharges in the seaway. (A. 99).

Appellants need have no fear based on the ground of possible diverse requirments among the States. *If they comply with the Michigan requirement of total retention of sewage they will be in compliance with the regulations of all other states, as well as with any forthcoming regulations of the EPA, for there can be no more restrictive requirement than complete retention and no discharge.*

In *Huron Portland Cement Co.* v. *Detroit*, 362 US 440 (1960), the Court stated in the words of Mr. Justice Stewart:

> "Legislation designed to free from pollution the very air that people breathe clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power. In the exercise of that power, the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities concurrently with the federal government."

The foregoing words are of at least equal verity when the regulation concerns *the very water which tens of thousands of people drink.*

## IX.

## ADMIRALTY OR MARITIME LAW IS NOT INFRINGED UPON BY THE MICHIGAN STATUTE.

Appellants, expecially amici curiae, lean heavily upon the proposition that the Michigan statute is completely invalid as an infringement upon the exclusive federal domain of admiralty and maritime law. Too broadly do they interpret the decisions upon which they rely. Amici properly quoted from *The Lottawanna*, 88 US (21 Wall 558 (1874)), to the effect that the jurisdiction of the United States extends "to all cases of admiralty and maritime jurisdiction." Nonetheless, speaking in *Lottawanna*, Mr. Justice Bradley stated at 581:

> "Indeed, there is quite an extensive field of border legislation on commercial subjects (generally local in character) which may be regulated by State laws until Congress interposes, and thereby excludes further State legislation. Pilotage is one of the subjects in this category. So far as Congress has interposed, its authority is supreme and exclusive; but where it has not done so, the matter is still left to the regulation of State laws."

At that time in history Mr. Justice Bradley even left the purely maritime subject of pilotage, the guidance of a vessel, to state action until Congress acted. In the case at hand the subject matter, viz., discharge of sewage, cannot even remotely be connected with the operation of a vessel in the sense of an "admiralty" or "maritime" procedure. Lest it be otherwise interpreted the Michigan statute, in Section 11, defers to federal authorities. No federal regulation now being extant with reference to the discharge of sewage from vessels, the Michigan statute may stand.

In *Kelly* v. *Washington,* 302 US 1 (1937), (cited with approval in *Huron Cement* v. *Detroit,* 362 US 440) (1960), this court upheld a state vessel inspection act in an area wherein Congress had not acted. The Michigan statute is not in derogation of any federal licensing requirements which embrace sewage devices, and therefore no state-federal clash occurs. Indeed, federal inspection and approval of the sanitary devices mandated under Michigan law would take place. (A. 143, 144). Michigan is gratified that a federally-owned vessel of the Corps of Engineers has already been equipped with a total retention sewage system. (R. 58).

Amici place reliance on the recent Florida District Court decision by a three-judge court, *American Waterways Operators, Inc. et al.,* v. *Askew, et al.* No. 71-156-Civ-J (M.D. Fla., December 10, 1971), wherein the Florida statute regarding pollution by oil spills was held unconstitutional. The similarity between the Florida case and this cause is practically non-existent. Florida provided for liability for oil spills on a no-fault basis, contrary to certain exceptions contained in the Federal statute, and the whole state statute occupied an area (oil spills) which had been comprehensively covered by the Federal statute. In the case at bar, we have no Federal regulations with which there may be a conflict and, indeed, federal authorities have advised appellants and others similarly situated that states may enact and enforce their own statutes until the coming of Federal regulations. With all deference to the Federal District Court of Florida, we point out that *American Waterways* is only one District Court opinion vis-a-vis that of another District Court—on dissimilar facts.

Michigan is somewhat surprised at the position taken by foreign amici inasmuch as the problem which the Michigan requirement seeks to help solve has not been aggravated by

foreign vessels plying our waters. In most cases such vessels, in order to comply with complete retention of sewage requirements, have taken portable holding tanks aboard at Montreal, made their trip into the Great Lakes, and then dropped the tanks off at Montreal on the way out. (A. 114).

## SUMMARY OF ARGUMENT

1. The Michigan Statute, Act 167, Public Acts of 1970, is a legitimate exercise of the State's police power in that it is a measure designed to reduce pollution of Michigan waters of the Great Lakes by prohibiting the discharge of sewage into said waters, and therefore is a measure of great significance in protecting the health, safety, and welfare of the residents of this state.

2. The Michigan statute places no undue burden upon interstate or foreign commerce, and is within the ambit of authority which may be exercised by the states in accordance with this Court's decision in *Huron Portland Cement Company* v. *Detroit*, 362 US 440 (1960).

3. The District Court properly abstained from deciding the merits of this cause, no arrests or harassment under the statute having occurred, and the courts of Michigan not having interpreted the precise meaning of the language contained in the statute. Thus a potential conflict with federal interpretation was, at least for the present, avoided.

4. There is no conflict between State and Federal law and regulations inasmuch as no Federal regulations have been promulgated and until same are enacted the states are free to legislate on the matter of discharge of sewage

from vessels. Federal authorities have already advised appellants and others likewise situated that devices such as those prescribed by the Michigan statute will meet Federal standards when same are promulgated. (18 CFR Part 640 as published in the Federal Register Vol. 36, No. 92 — Wednesday, May 12, 1971). Federal regulations, when same are finally promulgated, will not be effective for five years after the effective date thereof. Therefore, no supremacy clause question is now present in this case.

5. The equal protection clause of the Constitution is not violated inasmuch as the Michigan statute applies equally to all watercraft plying Michigan waters. The fact that other sources of Great Lakes pollution exist and are not subject to the statute does not vitiate a law devoted to the disposition of human waste from vessels.

6. As permitted under the Water Quality Improvement Act, the Governor of the State of Michigan has applied to the Administrator of the Environmental Protection Agency for a "no discharge" order. No action will be taken upon this request until the EPA rules on sewage from vessels are promulgated and made effective. If the Governor's request is ultimately granted, appellants' bases for complaint in this cause are purely academic and moot. (Appendix B to this Brief)

## CONCLUSION

Wherefore, appellees urge the Court to affirm the decision of the three-judge District Court heretofore entered in this cause.

Respectfully submitted,

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Dated: February 18, 1972

# APPENDIX

## APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

| | |
|---|---|
| LAKE CARRIERS' ASSOCIATION and AMERICAN STEAMSHIP COMPANY, et al., Plaintiffs, vs. RALPH A. MacMULLAN, et al., Defendants. | CIVIL ACTION NO. 36194 |

## MEMORANDUM OPINION

Before EDWARDS, Circuit Judge, and KEITH and PRATT, District Judges.

PRATT, District Judge:

Plaintiffs in this proceeding are the Lake Carriers' Association and 19 of its 21 member companies who own and operate Great Lakes cargo vessels. Defendants are the Attorney General of the State of Michigan, the Michigan Department of Natural Resources and its Director and the Michigan Water Resources Commission and its Executive Secretary.

The complaint seeks a declaratory judgment holding that the Michigan Water Pollution Act of 1970 (Act 167 of Public Acts of 1970) is constitutionally infirm and conflicts with federal legislation, and correspondingly, re-

quests that the State of Michigan be enjoined from enforcing that Act.

A three judge Court was convened pursuant to Section 2284 of Title 28 of the United States Code and a hearing was conducted on April 26 and 27, 1971.

The plaintiffs present five major issues as the basis for relief:

1. That the federal government has pre-empted the field of pollution control in the waters of the Great Lakes and that the Michigan Water Pollution Act conflicts with a federal statute, specifically (Water Pollution Control Act as amended by the Water Quality Improvement Act of 1970, 33 U.S.C. Sec. 1151 et seq.); the said federal statute manifests the intention of the federal government to occupy the field exclusively; and that federal vessel inspection laws, administered by the U. S. Coast Guard, preclude state prescription of shipboard equipment.

2. That the Michigan Water Pollution Act places an undue burden on interstate commerce.

3. That the Michigan Water Pollution Act interferes materially with uniform maritime law.

4. That the Michigan Water Pollution Act denies plaintiffs due process and the equal protection of the laws.

5. That the language and provisions of the Michigan Water Pollution Act are unconstitutionally vague and, thus, unenforceable.

Great Lakes shipping can be characterized as a large, vital and sophisticated industry. It traverses all of the

Great Lakes, the connecting waterways and tributaries and touches upon the states of Minnesota, Wisconsin, Illinois, Indiana, Michigan, Ohio, Pennsylvania and New York and the Canadian provinces of Ontario and Quebec. The advent of the St. Lawrence Seaway System provides an international flavor to shipping on the Great Lakes.

As an example of the size and scope of the industry, as of January 1, 1970, there were a total of 442 vessels in excess of 1,000 tons on the Great Lakes. Of this total, 263 were vessels of United States Registry, having a combined tonnage of 1,802,776 gross tons, and 179 were vessels of Canadian Registry having a combined tonnage of 1,576,165 gross tons. Flow charts indicate that the total commerce of the lakes in 1964 was 210,830,576 short tons with the primary commodities being iron ore, coal, grain, stone, petroleum, cement and sand and gravel. Of this commerce, about one-third (approximately 72 million short tons) utilizes or touches Michigan ports. A resume of trade patterns and courses shows that Great Lakes cargo vessels cross and criss-cross during the shipping season from a great variety of ports within the Great Lakes waterway system, and may enter a particular state's waters frequently without touching at a port in that state. Generally, if recommended navigational courses are followed, the vessels do not, while traversing open waters come within three miles of land except when entering or leaving a port or when in a connecting waterway.

A typical or average Great Lakes cargo vessel would be between 500 and 600 feet in length, have a gross tonnage of 7,500 tons and a carrying capacity of 12,000 gross tons. It is a flat-decked vessel except for the "houses" fore and aft where are located the crew quarters, machinery, supplies, navigational and other equipment necessary to the operation of the vessel. The center length of the

vessel is devoted to cargo. Crew sizes range from 30 to 35 men per vessel and it is estimated each man daily generates 125 gallons of liquid waste (including wash and bathing water and sanitary flush water).

Recognizing the need for pollution control devices and systems, a part at least of the Great Lakes shipping industry has taken some steps in the direction of reducing the discharge of pollutants. Approximately 30 ships have installed a macerating-chlorinating system and another 26 (including four Canadian registry vessels) have installed biogest systems. Other systems are also being tried emperically aboard some vessels, and are of the incinerating or of the "package-treatment plant" type.

It is within the foregoing context that the State of Michigan enacted the Water Pollution Control Act of 1970, and began its implementation by, first enforcing the requirements relating to pleasure craft and then by approaching the owners and operators of Great Lakes cargo vessels in order to obtain compliance with the provisions of the Act.

The Water Pollution Control Act of 1970, (a copy of which is attached hereto as Appendix A) as particularly pertinent here, provides that:

> Sec. 3. (1) A person shall not place, throw, deposit, discharge or cause to be discharged into or onto the waters of this state, any litter, sewage, oil or other liquid or solid materials which render the water unsightly, noxious or otherwise unwholesome so as to be detrimental to the public health or welfare or to the enjoyment of the water for recreational purposes.

and,

> Sec. 4. (2) A person owning, operating or otherwise concerned in the operation, navigation or management of a watercraft having a marine toilet shall not own, use or permit the use of such toilet on the waters of this state unless the toilet is equipped with 1 of the following pollution control devices:
>
> (a) A holding tank or self-contained marine toilet which will retain all sewage produced on the watercraft for subsequent disposal at approved dockside or onshore collection and treatment facilities.
>
> (b) An incinerating device which will reduce to ash all sewage produced on the watercraft. The ash shall be disposed of onshore in a manner which will preclude pollution.
>
> Sec. 11. Any person who violates any provision of this act is guilty of a misdemeanor and shall be fined not more than $500.00. To be enforceable, the provision or the rule shall be of such flexibility that a watercraft owner, in carrying out the provision or rule, is able to maintain maritime safety requirements and comply with the federal marine and navigation laws and regulations.

From the above provisions, it appears that the legislature of the State of Michigan sought to draw a distinction between the discharge of "noxious" materials and the discharge of "sewage" (defined in Section 2(d) as ".... all human body wastes, treated or untreated."), in the latter instance requiring either a holding tank or an incinerating device, whereas in the former the prohibition does not proscribe the discharge of "treated" material.

As a result of the overtures of state officials, with the aim of establishing voluntary compliance within a reasonable time, some ship owners have installed holding tanks to control sewage discharge; for example, Ford Motor Company has installed two 1,000 gallon holding tanks on each of its six vessels at a cost of approximately $20,000.00 per vessel. The Ford vessels' holding tanks are pumped out at the Ford dock when the ships return to their port by the utilization of septic tank pump-out trucks at a cost of between $50.00 and $70.00 per ship.

The latter finding points up a significant feature, that is, that Michigan has, as yet, provided no pump-out facilities at any of its ports, although it is anticipated that arrangements with municipal authorities or others (including dock owners and ship owners or operators with their own docks) will establish a network of such facilities.

Against this background is superimposed the entry of the federal government by virtue of the Water Quality Improvement Act of 1970, supra, which has as one of its major purposes pollution control of navigable waters, including the Great Lakes system.

In paraphrase, the federal Act provides that as soon as possible after April 3, 1970, the Secretary of Interior shall promulgate federal standards of performance for marine sanitation devices which shall be designed to prevent the discharge of untreated or inadequately treated sewage into or upon the navigable waters of the United States. (Section 1163 (b)(1).) The Act also provides that initial standards and regulations shall become effective for new vessels two years after promulgation and for existing vessels five years after promulgation. (Section 1163 (c)(1).) Subsection (f) of Section 1163 prohibits

any state from enforcing any statute or regulation with respect to the design, manufacture, or installation or use of any marine sanitation device on any vessel subject to the section after the effective date of the initial standards and regulations promulgated under the section. A state may, however, apply to the Secretary for a regulation prohibiting the discharge of *any* sewage into waters of that state. (Emphasis supplied.)

There is no dispute that the vessels and waters covered by the Federal Act are the same vessels and waters which are the subject matter of this case. The cause of plaintiffs' anxiety and apprehension is not, however, limited to the alleged conflict between the Federal Act and the Michigan Act. For example, pollution control of the waters of the Great Lakes has been a matter of discussion between the governments of the United States and Canada and specific reference has been made to the problem of achieving compatible regulations governing waste disposal by commercial vessels. (Ex. 23, Communique of the Canada/United States Ministerial Meeting on Great Lakes Pollution, June 23, 1970); the Canadian government has circularized to the shipping industry proposed regulations governing sewage and garbage disposal on the Great Lakes waters within its boundaries (Ex. 22); in early 1968, Federal authorities met with representatives of Lake Michigan states regarding pollution control of that Lake and it was there recognized that sewage disposal directly into Lake Michigan waters was a distinct threat to the quality of the Lake (Ex. 21); a bill has been introduced into the Wisconsin legislature which purports to regulate sewage discharge from commercial vessels into the waters of that state (Exhibit D).

Adding to the uncertainties created by the foregoing is the expressed fear of the plaintiffs that Michigan may,

administratively or judicially, interpret its statutes to require that Great Lakes vessels install huge holding tanks of a capacity (40,000 gallons) that would retain for eventual pumping out *all* materials, fluids and substances generated by and on a vessel.

Inherent, then, in this situation, assert the plaintiffs, is the real possibility that each of the governmental units involved, if left to their own devices, would promulgate different, conflicting standards, prohibitively costly and structurally dangerous and, presumably, each statute with a criminal penalty.

But with a recitation of what is, should be coupled a recitation of what is not. In that balance sheet lies the real crux of the issues presented and the role of this Court.

The pollution of our environment has become a major problem of our society. There is hardly an industry, a governmental unit, a citizens' organization — nor even a person — who is not daily confronted with dire warnings regarding the danger confronting our ecology if corrective and reparative steps are not taken immediately. There are few dissenters and conflicts appear to arise only as to timetables, methods and expense. Investigations, studies, reports, surveys and conferences abound.

Michigan has chosen to promulgate a program, which is original within the Great Lakes region as it respects lakes pollution. No other state, province or national government has, as yet, instituted a Great Lakes pollution control program although certainly each is involved and concerned. The significant factor is, however, that the plaintiffs here request relief on the basis of an *anticipation* that other governmental units will act, presumably in the

imminently near future and that such action will in fact conflict with Michigan standards.

Further, although the plaintiffs asserted that the Michigan statute might or could be interpreted to require holding tanks of 40,000 gallon capacity, there is no substantial grounds for that assertion, particularly in view of the stated position of Michigan authorities that the holding tank provision is aimed at the elimination of the practice of discharging *human wastes* into Michigan waters.

Primary in the factual picture and, therefore, paramount in the Court's consideration, is the attitude of Michigan authorities who seek the cooperation of the industry in the implementation of its program and have not instigated, nor does it appear, threatened criminal prosecutions.

It is this consideration that gives us the starting point of our discussion of the issues.

*Wilson* v. *Schnettler*, 365 U.S. 381, provides a succinct guideline regarding the role of the federal courts vis a vis state courts, when Justice Whittaker wrote (at page 385):

> There is still another cardinal reason why it was proper for the District Court to dismiss the complaint. We live in the jurisdiction of two sovereignties. Each has its own system of courts to interpret and enforce its laws, although in common territory. These courts could not perform their respective functions without embarrassing conflicts unless rules were adopted to avoid them. Such rules have been adopted. One of them is that an accused "should not be permitted to use the machinery of one sovereignty to obstruct his trial in

> the courts of the other, unless the necessary operation of such machinery prevents his having a fair trial." *Ponzi* v. *Fessenden*, 258 U.S. 254, 260. Another is that federal courts should not exercise their discretionary power "to interfere with or embarrass threatened proceedings in state courts save in those exceptional cases which call for the interposition of a court of equity to prevent irreparable injury which is clear and imminent . . . ." *Douglas* v. *City of Jeannette, supra*, at 163.

A later exposition of the principle is contained in *Dombrowski* v. *Pfister*, 380 U.S. 479, where it was said (pages 484, 485):

> ". . . . considerations of federalism have tempered the exercise of equitable power, for the Court has recognized that federal interference with a State's good-faith administration of its criminal laws is peculiarly inconsistent with our federal framework. It is generally to be assumed that state courts and prosecutors will observe constitutional limitations as expounded by this Court, and that the mere possibility of erroneous initial application of constitutional standards will usually not amount to the irreparable injury necessary to justify a disruption of orderly state proceedings."

The impact of *Wilson* and *Dombrowski* is a pervading one, particularly, as here, where dealing as we are with a penal statute, prosecution has not been instituted and threatened prosecution does not appear imminent. (See *Doe* v. *Randall*, 314 F. Supp. 32, D. Minnesota, aff'd *Hodgson* v. *Randall*, 39 L.W. 3505.)

Nor is there any intimation that the "necessary operation" of state court machinery would prevent a fair trial.

On the contrary, there is every reason to believe that the Michigan court system, with its declaratory judgment procedures (Michigan Court Rules, GCR 1963, Section 521) provide full and adequate machinery to insure a fair hearing of plaintiffs' cause. More importantly, there is every reason to believe that the Michigan courts are eminently qualified to apply constitutional standards studiously and assiduously in their determinations regarding the validity of state statutes.

Reviewing the issues framed previously, there appears to this Court to be compelling reasons to abstain from consideration of the matter in its present posture.

With regard to pre-emption, the Supreme Court in *Swift & Co.* v. *Wickham,* 382 U.S. 111, held that Supremacy Clause cases are not within the purview of a three judge court.

With regard to the other issues, the lack of a justiciable controversy precludes entry of this Court into the matter. No prosecution is pending, nor threatened which would realistically infer that plaintiffs in a trial of a case would be denied the benefits of the Due Process and Equal Protection clauses or that a State court would not consider the other constitutional issues with circumspection and thoroughness in the usual and normal course.

An overview of the factual situation presented by the evidence in this case compels but one conclusion: that the plaintiffs here are seeking an advisory opinion that would have the effect of prohibiting any state action in the field of Great Lakes water pollution until such time as the federal government manifests its intention and takes control. This the Court declines to do, especially upon reflection of the clear direction given by the Supreme Court in

*Public Service Commission of Utah. et al.*, v. *Wycoff Company, Inc.*, 344 U. S. 237, which involved an interestingly similar situation.

Summarizing the case before it, the Supreme Court said (page 245):

> "In the first place, this dispute has not matured to a point where we can see what, if any, concrete controversy will develop. It is much like asking a declaration that the State has no power to enact legislation that may be under consideration but has not yet shaped up into an enactment."

And went on to say, (pages 247, 248):

> "Declaratory proceedings in the federal courts against state officials must be decided with regard for the implications of our federal system. State administrative bodies have the initial right to reduce the general policies of state regulatory statues into concrete orders and the primary right to take evidence and make findings of fact. It is the state courts which have the first and the last word as to the meaning of state statutes and whether a particular order is within the legislative terms of reference so as to make it the action of the State. We have disapproved anticipatory declarations as to state regulatory statutes, even where the case originated in and was entertained by courts of the State affected. *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450. Anticipatory judgment by a federal court to frustrate action by a state agency is even less tolerable to our federalism. Is the declaration contemplated here to be *res judicata*, so that the Commission cannot hear evidence and decide any matter for itself? If so, the federal court has virtually lifted

the case out of the State Commission before it could be heard. If not, the federal judgment serves no useful purpose as a final determination of rights.

The procedures of review usually afford ample protection to a carrier whose federal rights are actually invaded, and there are remedies for threatened irreparable injuries. State courts are bound equally with the federal courts by the Federal Constitution and laws. Ultimate recourse may be had to this Court by certiorari if a state court has allegedly denied a federal right.

In this case, as in many actions for declaratory judgment, the realistic position of the parties is reversed. The plaintiff is seeking to establish a defense against a cause of action which the declaratory defendant may assert in the Utah courts. Respondent here has sought to ward off possible action of the petitioners by seeking a declaratory judgment to the effect that he will have a good defense when and if that cause of action is asserted. Where the complaint in an action for declaratory judgment seeks in essence to assert a defense to an impending or threatened state court action, it is the character of the threatened action, and not of the defense, which will determine whether there is federal-question jurisdiction in the District Court. If the cause of action, which the declaratory defendant threatens to assert, does not itself involve a claim under federal law, it is doubtful if a federal court may entertain an action for a declaratory judgment establishing a defense to that claim. This is dubious even though the declaratory complaint sets forth a claim of federal right, if that right is in reality in the nature of a defense to a threatened cause of action. Federal courts will not seize litigations from state courts merely because one,

> normally a defendant, goes to federal court to begin his federal-law defense before the state court begins the case under state law. *Tennessee* v. *Union & Planters' Bank*, 152 U.S. 454; *The Fair* v. *Kohler Die & Specialty Co.*, 228 U.S. 22; *Taylor* v. *Anderson*, 234 U.S. 74."

For the foregoing reasons, this Court will abstain from further consideration of the matter.

The Court is mindful of the recent action of the Environmental Protection Agency which on May 12, 1971, published a "Notice of Proposed Rule Making". The Notice announces that the Agency proposed to amend 18 CFR Part 640 by the promulgation of marine sanitation standards which would permit the use of described treatment devices. Holding tanks or incinerating devices are not required under the proposed standards. The Notice also provides that interested persons may submit views, comments and recommendations concerning the proposed standard to the Agency within 45 days of publication of the Notice.

Defendants have conceded that pre-emption would take place when the initial standards and regulations become effective. Certainly the current action of the Environmental Protection Agency must be carefully considered by the defendants in the interpretation and enforcement of the Michigan statute. This circumstance serves to emphasize the reluctance and declination of the Court to intrude into a matter which is yet unformed.

The temporary restraining order heretofore entered is dissolved and the complaint dismissed without prejudice

to plaintiffs to institute other appropriate judicial proceedings.

George C. Edwards, Jr. /s/
GEORGE C. EDWARDS, JR.
United States Circuit Judge

Damon J. Keith /s/
DAMON J. KEITH
United States Circuit Judge

Philip Pratt /s/
PHILIP PRATT
United States Circuit Judge

Dated: July 12, 1971.

**STATE OF MICHIGAN**
**Act 167, PUBLIC ACTS OF 1970**

AN ACT to regulate the disposal of oil and sewage from watercraft; and to prohibit littering of waterways.

The People of the State of Michigan enact:

Sec. 1. This act shall be known and may be cited as the "watercraft pollution control act of 1970".

Sec. 2. As used in this act:

(a) "Act" means Act No. 245 of the Public Acts of 1929, as amended, being sections 323.1 to 323.12a of the Compiled Laws of 1948.

(b) "Commission" means the water resources commission of the department of natural resources.

(c) "Litter" means all rubbish, refuse, waste material,

garbage, offal, paper, glass, cans, bottles, trash, debris or other foreign substances of every kind and description.

(d) "Sewage" means all human body wastes, treated or untreated.

(e) "Oil" means oil of any kind or in any form, including but not limited to petroleum, fuel oil, sludge and oil refuse.

(f) "Marine toilet" means any toilet on or within a watercraft used to discharge sewage.

(g) "Watercraft" means any contrivance used or capable of being used for navigation upon water, whether or not capable of self-propulsion, including foreign and domestic vessels engaged in commerce upon the waters of this state, passenger or other cargo-carrying vessels and privately owned recreational watercraft.

(h) "Waters of this state" means all of the waterways on which watercraft may be used or operated including, but not limited to, the Great Lakes and connecting waterways under the jurisdiction of this state.

(i) "Person" means an individual, partnership, firm, corporation, association or other entity.

(j) "Discharge" means any spilling, leaking, pumping, pouring, emitting, emptying or dumping.

Sec. 3. (1) A person shall not place, throw, deposit, discharge or cause to be discharged into or onto the waters of this state, any litter, sewage, oil or other liquid or solid materials which render the water unsightly, noxious or otherwise unwholesome so as to be deterimental to the public

health or welfare or to the enjoyment of the water for recreational purposes,

(2) It is unlawful to discharge, dump, throw or deposit garbage, litter, sewage or oil from a recreational, domestic or foreign watercraft used for pleasure or for the purpose of carrying passengers, cargo or otherwise engaged in commerce on the waters of this state.

Sec. 4. (1) Any pleasure or recreational watercraft operated on the waters of this state, which is moored or registered in another state or jurisdiction, if equipped with a pollution control device approved by that jurisdiction, may be approved by the commission to operate on the waters of this state.

(2) A person owning, operating or otherwise concerned in the operation, navigation or management of a watercraft having a marine toilet shall not own, use or permit the use of such toilet on the waters of this state unless the toilet is equipped with 1 of the following pollution control devices:

(a) A holding tank or self-contained marine toilet which will retain all sewage produced on the watercraft for subsequent disposal at approved dockside or onshore collection and treatment facilities.

(b) An incinerating device which will reduce to ash all sewage produced on the watercraft. The ash shall be disposed of onshore in a manner which will preclude pollution.

Sec. 5. All marinas operating on the bottomlands of the Great Lakes under lease from the department of natural resources under Act No. 247 of the Public Acts of 1955, as amended, being sections 322.701 to 322.715 of the Compiled Laws of 1948 and all those operating on the bottomlands

of inland lakes and streams under permit from the department of natural resources under Act No. 291 of the Public Acts of 1965, as amended, being sections 281.731 to 281.752 of the Compiled Laws of 1948 if selling marine fuel or otherwise providing a dockside service center shall provide pump-out facilities approved by the department of public health for marine toilet holding tanks on pleasure watercraft. Failure to comply with the provisions of this section by any marina owner or operator is just cause for revoking the permit or prohibiting the issuance of a lease for the use of the state's bottomlands. The owner or operator of a marina shall be given written notice and opportunity of hearing before any action is taken.

Sec. 5a. All marinas owned and/or operated or leased by the Michigan waterways commission shall by July, 1971 provide pump-out facilities approved by the department of public health for marine toilet holding tanks or pleasure and commercial watercraft.

Sec. 5b. Any marina or dock which is equipped to handle watercraft of the size capable of being equipped with a marine toilet, owned, leased or operated by the state, any of its departments or agencies or any local unit of government shall maintain a pumping station for pumping out the holding tank required on watercraft.

Sec. 5c. Any marina or dock that holds 15 watercraft or less is exempt from section 5 of this act.

Sec. 6. An applicant for a boat plate registration for a watercraft pursuant to section 1a of Act No. 70 of the Public Acts of 1911, as amended, being section 207.51a of the Compiled Laws of 1948 shall disclose at such time to the commission whether the watercraft has in or on it a marine toilet, and if so, whether the toilet is equipped with a

pollution control device as required by this act. The commission may request the secretary of state to provide it with the name of registrant whose registration indicates the absence of such pollution control device on a marine toilet.

Sec. 7. (1) A person owning, operating or otherwise concerned in the operation, navigation or management of a watercraft operating on the waters of this state shall not discharge or permit the discharge of oil or oily wastes from the watercraft into or onto the waters of this state if the oil or oily wastes threaten to pollute or contribute to the pollution of the waters or adjoining shorelines or beaches.

(2) The owner or operator of any watercraft who, whether directly or through any person concerned in the operation, navigation or management of the watercraft, discharges or permits or causes or contributes to the discharge of oil or oily wastes into or onto the waters of this state or adjoining shorelines or beaches shall immediately remove the oil or oily wastes from the waters, shorelines or beaches. If the state removes the oil or oily wastes which were discharged by an owner or operator, the watercraft and the owner or operator are liable to the state for the full amount of the costs reasonably incurred for its removal. The state may bring action against the owner or operator to recover such costs in any court of competent jurisdiction.

Sec. 8. All watercraft moored, operated or located upon the waters of this state are subject to inspection by the commission, any lawfully designated agent or inspector thereof or any peace, conservation or police officer for the purpose of determining if the watercraft is equipped in compliance with the requirements of this act. The commission may inspect marinas and other waterside facilities used by watercraft for launching, docking or mooring pur-

poses to determine if they are equipped with trash receptacles, sewage disposal equipment or both. Commercial docks and wharfs designed for receiving and loading cargo and/or freight from commercial watercraft must furnish facilities, if determined necessary, as prescribed by the commission, to accommodate discharge of sewage from heads and galleys, and for deposit of litter, garbage, trash, or bilge waters from the watercraft which utilize the docks or wharfs.

Sec. 9. The state fully reserves to itself the exclusive right to establish requirements with reference to the disposal or discharge of sewage, litter and oil from all watercraft. In order to assure statewide uniformity, the regulation by any political subdivision of the state of waste disposal from watercraft is prohibited.

Sec. 10. The commission may promulgate all rules necessary or convenient for the carrying out of duties and powers conferred by this act.

Sec. 11. Any person who violates any provision of this act is guilty of a misdemeanor and shall be fined not more than $500.00. To be enforceable, the provision or the rule shall be of such flexibility that a watercraft owner, in carrying out the provision or rule, is able to maintain maritime safety requirements and comply with the federal marine and navigation laws and regulations.

Sec. 12. This act shall take effect January 1, 1971.

This act is ordered to take immediate effect.

## APPENDIX "B"

## ENVIRONMENTAL PROTECTION AGENCY

Washington, D.C. 20460
October 12, 1971

Office of the Administrator

Honorable William G. Milliken
Governor of Michigan
Lansing, Michigan 48903

Dear Governor Milliken:

Thank you for your letter in which you requested this Agency to issue a regulation completely prohibiting the discharge from all vessels of any sewage, whether treated or not, into Michigan's portion of the Great Lakes or connecting channels thereof.

Any action by me on your request would be premature until such time as I issue final regulations setting standards for marine sanitation devices under Section 13. As you know, at present only proposed standards have been issued. We have received a large number of comments on the proposed regulation. We have also conducted five public meetings relating to this subject and the statements that were presented at these meetings have become a part of the official record. My staff is now itemizing and summarizing the concerns and recommendations that were contained in the comments and were presented at the public meetings. I will review this information and then publish an initial regulation on the control of vessel wastes pursuant to the mandate of Section 13 of P. L. 91-224.

We share your concern with protecting and enhancing the water quality of the Great Lakes. Section #13(f) of the Federal Water Pollution Control Act authorizes me to issue "no-discharge" regulations for vessels in particular bodies of water provided that it can be shown that such a regulation is necessary in order to achieve water quality standards. I will be pleased to issue a no-discharge regulation covering any portion of Michigan's part of the Great Lakes, to the extent that you supply me with information needed to support this determination mandated by the law.

Sincerely yours,
William D. Ruckelshaus /s/
WILLIAM D. RUCKELSHAUS
Administrator

# AMICUS CURIAE BRIEF

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1971

No. 422

LAKE CARRIERS' ASSOCIATION and AMERICAN STEAMSHIP COMPANY, et al.,

*Appellants,*

*vs.*

RALPH A. MACMULLAN, Individually and as Director, Michigan Department of Natural Resources, et al.,

*Appellees.*

## BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF AFFIRMANCE

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IN THE

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*vs.*

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*Appellees.*

## BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF AFFIRMANCE

### Interest of the *Amicus*

The State of New York has long been a leader in the enactment of legislation designed to protect the health and welfare of its citizens from the harmful effects of pollution. One such statute is Navigation Law § 33-c, enacted by the New York State Legislature in 1966 (N.Y. Laws, 1966, Chap. 897), an act similar in scope and effect to Act 167 of the Michigan Public Acts of 1970, the statute under consideration here. The constitutionality of Navigation Law § 33-c was recently upheld in *New York State Water-*

*ways Ass'n, Inc., et al.*, v. *Diamond, et al.*, —— F. Supp. —— (W.D.N.Y., January 12, 1972, BURKE, D.J.).*

The New York statute prohibits the placing, throwing, deposit or discharge into the waters of New York State, from any watercraft, marina or mooring, of any "sewage or other liquid or solid materials which render the water unsightly, noxious or otherwise unwholesome so as to be detrimental to the public health or welfare or to the enjoyment of the water for recreational purposes." It prohibits the use of marine toilets on watercraft on the water of New York State "unless the toilet is equipped with facilities that will adequately treat, hold, incinerate or otherwise handle sewage in a manner that is capable of preventing water pollution, as required by this section."

This provision, which became effective on March 1, 1970 after a substantial "lead-time" for boat owners and operators to comply, represents one of the most important strides taken in the ongoing battle against the pollution of our lakes, streams and rivers. It was prompted by a legislative finding that "[t]he protection of the safety, health, cleanliness and usefulness of the waters of the state requires that operation of watercraft, and marinas serving such vessels, be regulated in the interest of public health and public enjoyment." Prior to the enactment of § 33-c, there was no regulation in this State of toilets on watercraft, and as a result substantial quantities of raw sewage were deposited into waterways throughout the State. The severely harmful effects of this dumping of sewage scarcely require documentation, and it is our position that the Legislature was well within its ample authority under the State's police power to forbid the continuation of such discharges, just as it has done with regard to discharges from commercial, residential and industrial sources on shore.

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* The full text of Navigation Law § 33-c, and the decision of the District Court, are contained in the Appendix to this brief.

Because of New York's vital concern with the preservation and protection of its waters, and in view of the similarity between the Michigan statute under review and § 33-c, we view the outcome of this litigation with deep interest. We are concerned with the effect that appellants' challenge to the Michigan Act, if successful, might have on New York's efforts to protect its citizens from the harmful pollution caused by unrestricted dumping of untreated sewage into our waters. The decision in this litigation may have a substantial effect on the health, welfare and legal rights of the citizens of New York State and our sister states.

The State of New York, therefore, respectfully files this brief as *amicus curiae* pursuant to Rule 42 of the Revised Rules of this Court.

## ARGUMENT

### Act 167 of the Michigan Public Acts of 1970 does not operate in a field preempted by Congress, nor does it unconstitutionally interfere with interstate commerce.

#### A.

Appellants' contention that the Federal Water Pollution Control Act, 33 U.S.C. §§ 1151 *et seq.*, evidences the Congressional intent to preempt this field is not supported by the facts. Preemption can only occur where there is either "such actual conflict between the two schemes of regulation that both cannot stand in the same area [or] evidence of a Congressional design to preempt the field." *Florida Lime and Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 141.

The Federal Act provides (33 U.S.C. § 1163 [f]) that no State shall adopt or enforce its own laws concerning marine sanitation devices "[a]fter the effective date of the initial standards and regulations promulgated under this section"; § 1163 (c) (1) provides that such initial standards and regulations shall become effective two years after

promulgation for new vessels and five years after promulgation for existing vessels. The Federal standards have not as yet even been promulgated. Thus, by the unequivocal language of the Act itself, Congress has decreed that there will be no preemption of any State's regulation of any existing vessels for at least five years. The proposed initial Federal regulations and standards specifically provide that "[u]ntil such dates, the States have the authority to adopt and enforce their own statutes or regulations on this subject * * *." 18 CFR, Part 640, Fed. Reg., Vol. 36, No. 92, May 12, 1971, p. 8740. In the face of the foregoing, the argument that the intent of Congress was to preempt the field of marine sanitary regulation prior to such effective dates is utterly unpersuasive.

Nor is appellants' assertion that the Federal and State Acts are in conflict helpful to them. The State's standards on maritime sanitary devices cannot be in conflict with federal regulations that will not take effect until *five years* from now. When that occurs, State marine sanitation laws will be superseded, but in the meantime only State regulations will be in effect. Since neither set of standards will be operative simultaneously, there can be no showing that compliance with both Federal and State law would be a physical impossibility, *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520; *Morgan* v. *Virginia*, 328 U.S. 373; *Union Bridge Co.* v. *United States*, 204 U.S. 364, nor can it be demonstrated that the State Act could not be enforced without impairing the effectiveness of the Federal Act. It is thus clear that there is no "such *actual* conflict between the two schemes of regulation that both cannot stand in the same area", *Florida Lime and Avocado Growers* v. *Paul*, *supra*, emphasis supplied. See also *A. E. Nettleton Co.* v. *Diamond*, 264 N.E. 2d 118, 27 N.Y. 2d 182 (1970), app. dism. *sub. nom. Reptile Products Ass'n* v. *Diamond*, 401 U.S. 969 (1971) and *Palladio, Inc.* v. *Diamond*, 321 F. Supp. 630 (S.D.N.Y., 1970), aff'd 440 F. 2d 1319, cert. den. —— U.S. —— (decided Dec. 7, 1971).

There is no support for the argument that the States are powerless to act to protect the health and welfare of their residents during the period prior to the effectiveness of Federal standards. The doctrine of police power gives the State the right to enact legislation such as that challenged here. "The police power of the State is the least limitable of all the powers of government." *Matter of Engelsher* v. *Jacobs,* 157 N.E. 2d 626, 627, 5 N.Y. 2d 370 (1959), cert. den. 360 U.S. 902. This statute represents a reasonable effort by the State to protect its waters from pollution. Indeed, the Federal Water Pollution Control Act specifically recites and reiterates the traditional powers and responsibilities of the states in the cleaning and protection of their waterways. "In connection with the exercise of jurisdiction over the waterways of the Nation * * *, it is declared to be the policy of Congress to recognize, preserve and protect the primary responsibilities and rights of the States in preventing and controlling water pollution, * * *", 33 U.S.C. § 1151 (b); "Nothing in this chapter shall be construed as impairing or in any manner affecting the right or jurisdiction of the States with respect to the waters * * * of such States.", *ibid.* (c); "The Secretary shall encourage cooperative activities by the States for the prevention and control of water pollution; * * *", *ibid.* § 1154(a); "* * * State and interstate action to abate pollution of interstate or navigable waters shall be encouraged and shall not * * * be displaced by Federal enforcement action", *ibid.* § 1160(b). In the face of this overwhelming showing of Congressional deference to the States, the claim of preemption falls of its own weight.

Federal preemption of the "historic police powers of the States" will not be decreed "unless that was the clear and manifest purpose of Congress." *Rice* v. *Santa Fe Elevator Corp.,* 331 U.S. 218, 230. No such purpose can be shown here. See also, *Department of Health* v. *Passaic Valley Sewage Commission,* 242 A. 2d 675, 679-680, 100 N.J. Super. 540 (1968), aff'd 253 A. 2d 577, 105 N.J. Super.

565: "[N]o legislation is extant which has whittled away the power of the State or its agency, the Department, so as to deprive the Department of jurisdiction over pollution prevention in the New Jersey waters of upper New York Bay * * *."; *Albina Engine and Machine Works, Inc.* v. *Hershey Chocolate Corp.*, 295 F. 2d 619, 622 (9th Cir. 1961): "We find no conflict nor any Federal intent in preventing the City of Portland from legislating in this area [regulation of welding or burning aboard ships] in which the City's interest so obviously appears."

**B.**

Appellants' claim that the Michigan Act places an unconstitutional burden on interstate commerce is not maintainable. The courts have consistently upheld state enactments against this claim in the absence of a firm showing "of a Congressional purpose to create an exclusive system of regulation." See *Swift & Co.* v. *Wickham*, 230 F. Supp. 398, 406 (S.D.N.Y., 1964), cert. den. 385 U.S. 1036 (upholding State regulation of weights of fowl despite Federal Poultry Products Inspection Act); *Florida Lime and Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132 (*supra*). Also see *A. E. Nettleton Co.* v. *Diamond*, 264 N.E. 2d 118, *supra*, and *Palladio, Inc.* v. *Diamond*, 321 F. Supp. 630, *supra*, both upholding § 358-a of New York's Agriculture and Markets Law (regulating the sale in the State of products made from skins of animals facing extinction, where the State list of such animals was far broader than the Federal list) as against the claim that it unduly interfered with interstate commerce. The test, as expressed in the *Florida Lime* case, *supra*, is that "federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons —either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained." 373 U.S. at 142.

Appellants attempt to meet this test by arguing that the Michigan statute represents an effort by the State to inter-

fere with the Federal government's jurisdiction over maritime matters. But this is utterly without merit, since Act 167 is simply a water pollution control statute, and not a maritime or navigation statute as appellants contend. Its sole purpose is to help abate the serious pollution of Michigan waterways in order to protect the health of the State's citizens and enhance the cleanliness of the areas affected. This is well within the purview of the State's traditional police power. See *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. [illegible]442:

> "The ordinance [a Smoke Abatement Code] was enacted for the manifest purpose of promoting the health and welfare of the city's inhabitants. Legislation designed to free from pollution the very air people breath clearly falls within the exercise of even the most traditional concept of what is compendiously known as the police power. In the exercise of that power, the states and their instrumentalities may act, in many areas of interstate commerce and maritime activities, concurrently with the Federal Government."

In that case a local Smoke Abatement Code that applied to ship's boiler stacks, where the boilers had already been federally inspected and licensed, was upheld.

Given the degree to which the States today are commercially interconnected, almost any legislation under the State's police power may affect interstate commerce to some extent. This Court considered that very point in the *Huron* case, *supra*, 362 U.S. at 443-44:

> "In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the constitution when 'conferring upon Congress the regulation of commerce, . . . never intended to cut the States off from legislation on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great

> variety of ways, may affect commerce and the meaning of the Constitution.' *Sherlock* v. *Alling*, 93 U.S. 99, 103.''

See, also, *Terminal Railroad Association of St. Louis* v. *Brotherhood of Railroad Trainmen*, 318 U.S. 1, 6, where this Court stated:

> ''State laws have long regulated a great variety of conditions in transportation and industry, safety devices and protections, purity of water supply, fire protection, and innumerable others. • • • [W]e would hardly be expected to hold that the price of the federal effort to protect the peace and continuity of commerce has been to strike down state sanitary codes, health regulations, factory inspections, safety provisions for industry and transportation.''

Another area where this Court has consistently upheld State legislation against claims of undue interference with interstate commerce is in the field of railroad ''full crew'' laws. These statutes, which vary to some extent among those States which have enacted them, prescribe certain minimum crew sizes for specified railroad activities, and even though they frequently necessitate the ''halting of a train at the State line'' to add or subtract crew members, they have been held valid enactments under the police power doctrine. See *Brotherhood of Locomotive Firemen and Enginemen et al.* v. *Chicago, R.I. & P.R.R. Co. et al.*, 393 U.S. 129; *Missouri Pacific R. Co.* v. *Norwood*, 283 U.S. 249; *St. Louis & Iron Mountain Ry.* v. *Arkansas*, 240 U.S. 518; and *Chicago, R.I. & P.R.R. Co.* v. *Arkansas*, 219 U.S. 453. See, also, *New York Central R.R. Co.* v. *Lefkowitz*, 241 N.E. 2d 730, 23 N.Y. 2d 1 (1968).

In *A. E. Nettleton Co.* v. *Diamond*, 264 N.E. 2d 118, *supra*, and *Palladio, Inc.* v. *Diamond*, 321 F. Supp. 630, *supra*, the Courts considered the effect on interstate commerce of § 358-a of New York's Agriculture & Markets Law.

This statute prohibits the sale or offer for sale in New York of products made from the skins of certain animals, including animals which may lawfully be imported into the United States under the Federal Endangered Species Act (16 U.S.C. §§ 668aa *et seq.*) and which may lawfully be sold or offered for sale in other States. Yet, despite the obvious burden this statute places on interstate commerce, the Courts upheld it and found that whatever burden it does impose, it is not an *undue* or *unconstitutional* one.

Act 167 of the Michigan Public Acts of 1970 clearly does not place an unconstitutional burden on interstate commerce, nor does it interfere with the Federal government's general supervisory powers over maritime matters.

Appellants are in effect asking this Court to "sit as a 'superlegislature to weigh the wisdom of legislation'"—an anachronistic role which the judiciary has long refused to play in the area of protection of the public health and environment. *Ferguson* v. *Skrupa,* 372 U.S. 726, 731.

C.

Appellants' remaining objections to the Michigan Act are equally insubstantial. The claim that the language of Sec. 3(1) thereof is unconstitutionally vague is without merit. That section prohibits the discharge into Michigan waters of materials "which render the water unsightly, noxious or otherwise unwholesome so as to be detrimental to the public health or welfare or to the enjoyment of the water for recreational purposes." That terminology, identical to the wording of New York's § 33-c2(a) (p. 2a), does not require "men of common intelligence [to] guess at its meaning." *Lanzetti* v. *New Jersey,* 306 U.S. 451, 453. See *Joseph E. Seagram & Sons, Inc.* v. *Hostetter,* 384 U.S. 35, 48-50, reh. den. 384 U.S. 967; *Rowan* v. *United States Post Office Dept.,* 397 U.S. 728, 740. The words "unsightly, noxious and unwholesome", used in the context of a statute dealing with pollution of waters from

discharges from toilets on watercraft, are eminently clear to men of common intelligence as to the health hazard sought to be corrected or prevented. Indeed, a California Court has specifically ruled that the word "noxious" is not unconstitutionally vague. *People* v. *Plywood Manufacturers of California*, 291 P. 2d 587, 591, 137 Cal. App. 2d 859 (1955).

The argument that the statute discriminates against appellants is preposterous. It very clearly applies to *all* watercraft, both commercial and recreational, and thus does not exempt from its provisions any particular class of watercraft. Michigan has acted well within its ample police power in placing restrictions on waterborne polluters as a class, just as it has already placed restrictions on shore-based polluters as a class.

## CONCLUSION

**The decision of the District Court should be affirmed, and Act 167 of the Michigan Public Acts of 1970 should be declared to be constitutional in all respects.**

Dated: New York, New York, February 18, 1972.

Respectfully submitted,

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# APPENDIX

## § 33-c. Regulating disposal of sewage; littering of waterways

1. As used in this section, unless the context clearly indicates otherwise:

(a) The term "watercraft" means any contrivance used or capable of being used for navigation upon water whether or not capable of self-propulsion, except passenger or cargo-carrying vessels subject to the Quarantine Regulations of the United States Public Health Service adopted pursuant to Title forty-two of the United States Code.

(b) The term "marina" means any installation which provides any accommodations or facilities for watercraft, including mooring, docking, storing, leasing, sale, or servicing of watercraft, located adjacent to waters of the state.

(c) The term "sewage" means all human body wastes.

(d) The term "litter" means any bottles, glass, crockery, cans, scrap metal, junk, paper, garbage, rubbish, trash, or similar refuse.

(e) The term "marine toilet" means any toilet on or within any watercraft, except those that have been permanently sealed and made inoperative.

(f) The term "waters of this state" means all of the waterways, or bodies of water located within New York state or that part of any body of water which is adjacent to New York state over which the state has territorial jurisdictions on which watercraft may be used or operated.

(g) The term "person" means an individual, partnership, firm, corporation, association, or other entity.

(h) The term "department" means the state conservation department, except as otherwise provided in this section.

2. (a) No person, whether engaged in commerce or otherwise, shall place, throw, deposit, or discharge, or cause to be placed, thrown, deposited, or discharged into the waters of this state, from any watercraft, marina or mooring, any sewage, or other liquid or solid materials which render the water unsightly, noxious or otherwise unwholesome so as to be detrimental to the public health or welfare or to the enjoyment of the water for recreational purposes.

(b) No person, whether engaged in commerce or otherwise, shall place, throw, deposit or discharge, or cause to be placed, thrown, deposited, or discharged into the waters of this state, any litter from any watercraft, marina or mooring.

3. (a) No marine toilet on any watercraft used or operated upon waters of this state shall be operated so as to discharge any untreated sewage into said waters directly or indirectly.

(b) No person owning or operating a watercraft with a marine toilet shall use, or permit the use of, such toilet on the waters of this state unless the toilet is equipped with facilities that will adequately treat, hold, incinerate or otherwise handle sewage in a manner that is capable of preventing water pollution, as required by this section.

(c) Except as provided in subdivisions four and seven of this section, no container of sewage shall be placed, left, discharged or caused to be placed, left or discharged in or bordering any waters of this state by any person at any time.

4. (a) Every marine toilet on watercraft used or operated upon the waters of this state shall be equipped with a pollution control device, either for the treatment or holding of sewage, in operating condition, of a type approved by the state health department, in conformance with appli-

cable public health standards and rules and regulations; and approved by the department in conformance with the boating safety standards and rules and regulations adopted by the department. Pollution control devices shall be securely affixed to the interior discharge opening of marine toilets and all sewage passing into or through such toilets shall pass solely through such treatment facilities.

(b) Sewage passing through a marine toilet equipped with a chlorinator or chemical treatment facility shall be deemed untreated unless the effluent meets standards established by the state commissioner of health.

(c) The disinfecting agent used in the facility shall be of a kind which when discharged as a part of the effluent is not toxic to humans, fish or wildlife.

5. No marine toilet pollution control device shall be used, sold or physically offered for sale in this state unless it is of a type which has officially been approved by the department. The department approval shall be issued only after approval of such devices by the state department of health, as required by subdivision four of this section. Notice of such approval may be required by the department to be displayed on the pollution control device.

6. The department shall require persons making application for a boat registration certificate for a watercraft pursuant to section seventy-one of the navigation law to disclose whether such watercraft has within or on it a marine toilet, and if so, to certify that such toilet is equipped with a pollution control device as required by this section. The department is further empowered to direct that the issuance of a boat registration certificate or a renewal thereof be withheld if such device had not been installed as provided in this section.

7. The owner or whoever is lawfully vested with the possession, management or control of a marina shall be

required to provide suitable trash receptacles or similar devices designed for the depositing of litter at locations where they can be conveniently utilized by watercraft users.

8. All marinas that provide for the handling and disposal of sewage from holding tanks of watercraft shall do so in a manner that will prevent the pollution of the waters of the state. The facilities for unloading and disposal of such sewage shall be approved by either the local or the state health department in accordance with section twelve hundred thirty of the public health law.

9. All watercraft located upon waters of this state shall be subject to boarding and inspection by the department or health department or any lawfully designated agents or inspectors thereof, for the purpose of determining whether such watercraft is equipped with approved marina toilet pollution control facilities operated in compliance herewith.

10. By the enactment of this section, the state fully exercises the exclusive right to establish requirements with reference to the disposal of sewage from watercraft. In order to insure state wide uniformity, the regulation by any political subdivision of the state of sewage disposal from watercraft is prohibited on and after March first, nineteen hundred seventy.

11. The department is hereby authorized and empowered to make, adopt, promulgate, amend and repeal such standards and rules and regulations as are necessary, or convenient for the carrying out of duties and obligations and powers conferred on the department by this section.

12. A copy of the regulations adopted pursuant to this section and any of the amendments thereto, shall be filed in the office of the department, the health department, the water resources commission, and in the office of the secre-

tary of state. Rules and regulations and standards shall be published by the department in convenient form.

13. (a) Any person who violates paragraph (b) of subdivision two of this section, shall be guilty of an offense and upon conviction shall be punished with a fine of not more than one hundred dollars, or by imprisonment of not more than sixty days, or by both such fine and imprisonment; provided, however, that in the event any person violates this section more than twice during the same calendar year and is convicted of more than two such violations, the third and each subsequent violation shall be deemed a misdemeanor.

(b) Any person who violates any other provision of this section or regulations of the department adopted pursuant hereto shall be deemed guilty of a misdemeanor and upon conviction shall be punished with a fine of not more than one hundred dollars, or by imprisonment of not more than sixty days, or by both such fine and imprisonment.

14. Any action taken by the department or the state department of health pursuant to subdivisions five or six of this section shall be subject to review by the supreme court in the manner provided by article seventy-eight of the civil practice law and rules provided that no stay shall be granted pending the determination of the matter except on notice to the department and the state department of health and for a period not exceeding thirty days.

Proceedings to review any action enumerated herein shall be entitled to a preference.

15. If any court shall find any subdivision or subdivisions of this section to be unconstitutional or otherwise invalid, such findings shall not affect the validity of any sections of this act which can be given effect.

16. Nothing in this section, shall be deemed to repeal, amend, modify or alter the provisions of article twelve of

the public health law or the provisions of sections thirty-three-a and thirty-three-b of the navigation law. Added L.1966, c. 897, § 2; amended L.1967, c. 540, §§ 1, 2; L.1968, c. 1036, § 1; L.1969, c. 16, § 1; L.1970, c. 785, eff. 30th day after May 12, 1970.

Subd. 4 amended L.1967, c. 540, § 1, eff. April 24, 1967. L.1967 inserted "established by the state commissioner of health" and omitted the enumerated minimum standards of the effluent.

Subd. 8 amended L.1967, c. 540, § 2, eff. April 24, 1967; L.1970, c. 785, eff. 30th day after May 12, 1970. L.1967 substituted "marinas that" for "marinas shall" and inserted "shall do so". L.1970 added sentence beginning "The facilities".

Subd. 10 amended L.1968, c. 1036, § 1, eff. June 22, 1968; L.1969, c. 16, § 1, eff. March 4, 1969. L.1968 substituted March 1, 1969 in lieu of June 1, 1968. L. 1969 substituted "seventy" for "sixty-nine".

**Legislative declaration.** Section 1 of L.1966, c. 897, provided: "The protection of the safety, health, cleanliness and usefulness of the waters of the state requires that operation of watercraft, and marinas serving such vessels, be regulated in the interest of public health and public enjoyment."

**Effective date of L.1966, c. 897.** Section 3 of L.1966, c. 897, as amended L.1968, c. 1036, § 2; L.1969, c. 16, § 2, provided: "The provisions of this act with reference to requiring watercraft with toilet facilities to be equipped with pollution control devices, and prohibiting the placing, throwing, depositing or discharging of any untreated sewage from any watercraft into the waters of the state, shall take effect March first, nineteen-hundred seventy; provided, however, that until such effective date the provisions of any local law or ordinance requiring or regulating the installation of such devices, or prohibiting the placing, throwing, depositing or discharging of any untreated sew-

age from any watercraft into the waters of the state, shall remain in full force and effect. All other provisions of this act shall take effect August first, nineteen hundred sixty-six."

**1. Waters within section**

This section applies to the waters of Nassau and Suffolk counties as well as the other counties of the state and police officers of such counties, assigned to the duty of enforcement of sections 79-a, 79-b and 79-c, are, if designated by the office of parks and recreation, agents of that office for the purpose of determining compliance with this section. 1971, Op.Atty.Gen. Mar. 29.

## Opinion, United States District Court Western District of New York.

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Plaintiffs on July 13, 1971 filed an amended complaint asking for a declaratory judgment and injunctive relief. They ask this court to convene a three judge court pursuant to Section 2284 of Title 28, U.S.C., that Section 33-C of the Navigation Law of New York and the regulation promulgated, as applied to plaintiffs' watercraft, be declared unconstitutional in whole or in part, that the court enjoin temporarily and permanently the defendants, collectively and individually, from enforcing the provisions of Section 33-C of the Navigation Law, and particularly the criminal provisions thereof, and an injunction pending this suit.

This court fixed a date for a hearing on plaintiffs' application for a preliminary injunction.

The defendants by notice of motion dated August 18, 1971 moved to dismiss the complaint on specific grounds stated, among which are that this court lacks jurisdiction over the subject matter; that the action is premature, and that this court should abstain from taking jurisdiction under the doctrine of equitable abstention. The motions

came on for a hearing and oral argument. The respective parties have filed written memoranda.

## Findings of Fact

1. Section 33-c of the New York Navigation Law was enacted by the New York State Legislature in 1966 (Laws of 1966, Chapter 897). It prohibits the placing, throwing, deposit or discharge into the waters of New York State, from any watercraft, marine or mooring, of any "sewage or other liquid or solid materials which render the water unsightly, noxious or otherwise unwholesome so as to be detrimental to the public health or welfare or to the enjoyment of the water for recreational purposes." It prohibits the use of marine toilets on watercraft on the water of New York State "unless the toilet is equipped with facilities that will adequately treat, hold, incinerate or otherwise handle sewage in a manner that is capable of preventing water pollution, as required by this section." This provision went into effect March 1, 1970. The plaintiff contends that the statute is unconstitutional on the grounds that it conflicts with certain provisions of the Federal Water Quality Improvement Act and Water Pollution Control Act, creates an unconstitutional burden on interstate commerce, and is unconstitutionally vague and discriminatory.

2. This court declines to convene a three judge court as demanded in the complaint.

3. The plaintiffs do not sue for money damages, but only for a declaratory judgment and injunctive relief. They assert that this is a case involving also the admiralty and maritime jurisdiction of this court. Admiralty cannot give injunctive relief, Khedivial Line vs. Seafarers' Int. Union, 278 F. 2d. 49 (2 Cir. 1960); nor can it issue a declaratory judgment. This is not a case involving admiralty or maritime jurisdiction nor have the plaintiffs alleged any

other valid basis for jurisdiction of this court. This court lacks jurisdiction over the subject matter of the suit.

4. The Federal Water Pollution Control Act, 33 U.S.C. Section 1151 et seq, does not evidence congressional intent to preempt this field or to exclude state action at this time.

5. There is no merit to the argument of the plaintiffs that the state is powerless to act to protect the health and welfare of its residents during the period prior to the effectiveness of federal standards.

6. There is no merit to the claim of the plaintiffs that the statute constitutes an unconstitutional burden on interstate commerce.

7. There is no merit to plaintiffs' claim that Section 33-C could result in the impairment of contractual rights.

8. There is no merit to plaintiffs' claim that the provisions of Section 33-C permitting boarding and inspection of watercraft by state agents without a prior warrant constitutes a violation of the Fourth Amendment prohibition against warrantless searches. Moreover, none of the plaintiffs has been made the victim of an allegedly unconstitutional search nor has such a search been threatened, nor has the statute been enforced against any of them. When and if any plaintiff is prosecuted for violation of Section 33-C, and if that prosecution resulted from a search of its vessel without a warrant, it will then have an opportunity to raise its Fourth Amendment claims, if applicable, as a defense in a criminal prosecution.

9. Section 33-C fully complies with the constitutional requirements of due process and equal protection under the Fourteenth Amendment. Neither the complaint nor the amended complaint raises any substantial federal question.

10. Even if this court did have jurisdiction, it should abstain from exercising such jurisdiction in the circumstances of this case. Reetz vs. Bozanich, 397 U.S. 82; Zwickler vs. Koota, 389 U.S. 241. No state court has ever had an opportunity to interpret and construe the statute and procedures under attack here.

CONCLUSION OF LAW

1. Plaintiffs' motion for a preliminary injunction is denied. IT IS HEREBY SO ORDERED.

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the complaint and the amended complaint herein are dismissed.

HAROLD P. BURKE
HAROLD P. BURKE
United States District Judge

January 12, 1972.